



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-F-P- INC.

DATE: JUNE 22, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of brick paving services, seeks to employ the Beneficiary as an administrative manager. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree or its equivalent. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national with a master's degree, or a bachelor's degree followed by five years of experience, for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not establish the Beneficiary's qualifications for the offered position and the requested classification. The Director also found that the Petitioner did not demonstrate its required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts that, contrary to the Director's decision, the record establishes the Beneficiary's possession of at least five years of qualifying, post-baccalaureate experience. The Petitioner also contends that it has sufficient net current assets to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the minimum requirements of a certified position and can pay the proffered wage. If USCIS approves a petition, a

foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. REQUIREMENTS OF THE CLASSIFICATION AND POSITION

As previously indicated, advanced degree professionals must have “advanced degrees or their equivalent.” Section 203(b)(2)(A) of the Act. The term “advanced degree” means:

any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate a beneficiary’s possession, by a petition’s priority date, of all DOL-certified job requirements.¹ *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Acting Reg’l Comm’r 1977). In evaluating a beneficiary’s qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d. 1008, 1015 (D.C. Cir. 1983) (holding that the “DOL bears the authority for setting the *content* of the labor certification”) (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of administrative manager as a U.S. bachelor’s degree or a foreign equivalent degree in business administration or law, plus five years of experience in the job offered. The record establishes the Beneficiary’s receipt of a bachelor’s degree in an acceptable field of study in 2001.

On the labor certification, the Beneficiary attested that from February 2003 to June 2010 he gained more than seven years of full-time, post-baccalaureate experience, working as an administrative manager at a law firm in Brazil. Pursuant to 8 C.F.R. § 204.5(g)(1), the Petitioner submitted a letter from the Beneficiary’s former employer in support of his qualifying experience. However, as noted by the Director in the notice of intent to dismiss, statements on prior applications by the Beneficiary for U.S. visitor visas cast doubts on his claimed experience. A 2007 visa application lists the Beneficiary’s occupation at the law firm as “lawyer,” not administrative manager. Also, contrary to the information on the labor certification, the visa application states the firm’s name as containing the Beneficiary’s family name, suggesting his role as a company partner. In addition, a 2011 visa application states the Beneficiary’s employment as a “partner owner” at another Brazilian company from 2007 to 2010. These discrepancies in the Beneficiary’s employment history undermine his claimed, qualifying experience for the offered position and the requested classification. In order to

¹ This petition’s priority date is August 11, 2016, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

demonstrate the Beneficiary's eligibility, the Petitioner must resolve the inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the Petitioner maintains that, consistent with the information on the labor certification and in the law firm's letter, the Beneficiary worked for the firm as an administrative manager. Letters from a firm partner state that Brazilian regulations required at least two attorneys to establish the firm. The letters state that, as attorneys, the partner and the Beneficiary therefore established the firm in their names. But the partner stated that he handled the firm's legal work, while the Beneficiary handled its administrative duties, such as planning budgets, reviewing operations, and hiring employees. The letter states that, after the firm added another partner to help with legal work, the firm changed its name, adding the new partner's name to its moniker and dropping the Beneficiary's name. The letter states that, although no longer a named partner, the Beneficiary continued handling the firm's administrative matters. As proof of the Beneficiary's employment by the law firm, the Petitioner submitted copies of a 2007 paystub and his Brazilian income tax returns from 2007 through 2010. These documents identify the law firm as including the Beneficiary's name. Regarding the Beneficiary's employment by the other Brazilian company from 2007 to 2010, the Petitioner states that the 2011 visa application correctly identifies the Beneficiary as a "partner owner" of the other company. But the Petitioner asserts that, during that period, the Beneficiary worked only for the law firm. On appeal, the Petitioner submits a copy of a "contract amendment" filed with Brazilian authorities in 2010, removing the Beneficiary as a partner of the other company.

Despite the Petitioner's explanations and evidence, however, the record does not establish the Beneficiary's possession of five years of qualifying experience for the offered position and the requested classification. The paystub and tax returns document the Beneficiary's employment by the law firm for only three years, from 2007 to 2010. The record also does not resolve all the questions regarding the Beneficiary's claimed experience from 2007 to 2010, during which time the Beneficiary has reported overlapping employment. If the Beneficiary did not work for the other Brazilian company, the record does not explain why the 2011 visa application lists it as a former employer of his and describes his duties as "responsible for the commercial area of the company that imported electrical components from China." Counsel asserts that the travel agent who prepared the application mistakenly believed the Beneficiary worked for the company and incorrectly listed a description of its business as the Beneficiary's job duties. Counsel's assertion, however, does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The record must substantiate counsel's statements with independent evidence, which may include affidavits and declarations. Given the inconsistencies and lack of evidence to support counsel's statements, we find that the Petitioner has not demonstrated the Beneficiary's possession of five years of qualifying experience.

In addition, the record does not establish the Beneficiary's experience in the job offered for any period of time. The Petitioner has not explained why the 2007 visa application lists the Beneficiary's occupation with the firm as "lawyer," rather than administrative manager. Moreover, although the Petitioner submitted letters from a partner and accountant of the firm stating that the Beneficiary served

as administrative manager, the Petitioner has not offered historical corroborating evidence, such as contemporaneous business records, to support the claims. Considering the inconsistencies in the record, this unsupported testimonial evidence is insufficient to demonstrate that the Beneficiary has the required experience in the job offered.

Thus, contrary to the requirements of the offered position and the requested classification, the record does not establish the Beneficiary's possession of at least five years of qualifying post-baccalaureate experience.

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must also demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary a full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a beneficiary a full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any differences between a proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

Here, the labor certification states the proffered wage of the offered position of administrative manager as \$132,496 a year. As previously noted, the petition's priority date is August 11, 2016.

On appeal, the Petitioner submits a copy of its federal income tax return for 2017. The return reflects net current assets exceeding the annual proffered wage of \$132,496. The Petitioner has therefore demonstrated its ability to pay the proffered wage in 2017. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2016, the year of the petition's priority date. For that year, the Petitioner submitted two sets of financial statements. Contrary to the regulation, however, neither of the sets indicates that the statements were audited. The Petitioner therefore has not demonstrated its ability to pay the proffered wage in 2016.

² Federal courts have upheld USCIS' method of determining a petition's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's qualifications for the offered position and the requested classification. The Petitioner also did not demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of A-F-P- Inc.*, ID# 1434643 (AAO June 22, 2018)